

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re: Petition of City of Waltham

D.T.E. 02-11

**OPPOSITION TO REQUEST BY THE CITY OF WALTHAM TO INCLUDE
POST-HEARING EXHIBITS IN THE RECORD**

I. INTRODUCTION

On January 24, 2002, the City of Waltham (“Waltham”) filed a Petition (the “Petition”) with the Department of Telecommunications and Energy (the “Department”), requesting that the Department direct Boston Edison Company, d/b/a NSTAR Electric (the “Company”), to recalculate its purchase price for municipal streetlights sold by the Company to Waltham (Exh. W-1, at ¶ 14). However, the Petition merely included argument by Waltham’s counsel, without supporting evidence. Since the filing of Waltham’s Petition, the Department has provided Waltham with ample opportunity to support its Petition with evidence, including the opportunity to file pre-filed testimony and to introduce evidence into the record of this proceeding through an expert witness at the Department’s evidentiary hearing held on April 11, 2002. However, Waltham chose not to support its Petition with any evidence either before or at the Department’s evidentiary hearing, nor did Waltham take the opportunity to conduct discovery on the Company’s case.

However, on April 19, 2002, Waltham filed a letter with the Department that included two documents (the “Documents”) that Waltham requested be included in the record in this proceeding, without leave from the Department (the “April 19 Letter” or the “Letter”). Moreover, the Letter does not state good cause why Waltham failed to

include the Documents with its Petition or offer them for inclusion in the record through an expert witness. In addition, Waltham has failed to include an affidavit or other evidence that might authenticate either of the documents attached to the April 19 Letter. As described below, the Company requests that the Department deny Waltham's request to include the Documents in the record of this proceeding.

II. WALTHAM HAS FAILED TO DEMONSTRATE GOOD CAUSE FOR INCLUDING LATE-FILED DOCUMENTS IN THE RECORD OF THIS PROCEEDING

Although the April 19 Letter failed to cite any Department regulation that would allow Waltham to submit the Documents, the parties to this proceeding agreed during a conference call with the Hearing Officer that the Letter would be considered by the Department to be filed pursuant to 220 C.M.R. 1.11(7), regarding the filing of post-hearing exhibits. That regulation states, in relevant part, that:

The Department may, for good cause shown, allow the parties to file evidentiary documents of any kind, or exhibits, at a time subsequent to the completion of hearing, such time to be determined by the Commission. If a request for such subsequent filing is granted, the requesting party shall on or before the date set for filing, send copies of all documents or exhibits which are the subject of the request to all parties and persons who have filed appearances...

Id.

Waltham has not met the Department's standard for filing post-hearing documents on either procedural or substantive grounds, and therefore, the Department should deny Waltham's request to include the Documents in the record in this proceeding. Waltham's April 19 Letter violated both the letter and spirit of the Department's procedure for filing post-hearing documents because Waltham failed to allow the Department the opportunity to rule on its request to include the Documents in the record prior to their filing. The

Department's regulation at 220 C.M.R. 1.11(7) is predicated on a two-step process for filing post-hearing documents: (1) requesting leave from the Department to file post-hearing exhibits; and (2) a ruling from the Department granting the request. This procedure is vital because, once the Department has received post-hearing documents, such documents might unfairly influence the Department's decision in a proceeding, to the extent that they have not been authenticated or subjected to cross-examination. See Boston Gas Company, D.P.U. 88-67, at 6-7 (Phase II) (the Department analogized the unfairness of a post-hearing submission in that proceeding to "un-ringing a bell"). In this instance, Waltham has filed unauthenticated documents with the Department without permission to do so. Accordingly, on procedural grounds alone, the Department should deny Waltham's request to include the Documents in the record of this proceeding.

Waltham's request should also fail on substantive grounds because it has not demonstrated good cause why the Documents should be included in the record of this proceeding given the ample opportunity for Waltham to file the Documents prior to the closing of the record. Waltham admits on page 1 of the Letter that the first document included with the letter ("Document A") "was provided to the City by NSTAR as part of the purchase price communication with the City on October 18, 2001." However, Waltham fails to explain sufficiently why, if Document A is so important to its case, it was not offered by Waltham prior to April 19.

Waltham attempts to tie its request to submit Document A to its characterization of the Company's testimony during the April 11 hearing, i.e., that there is a "reasonable basis for assuming that the support equipment supporting the private lights was older than

the supporting equipment supporting the municipal lights” (April 19 Letter, at 2).¹ However, the Company has consistently stated throughout this proceeding, and, specifically, prior to the April 11 hearing, that the Company’s allocation methodology is based on the fact that the streetlighting plant booked to accounts 632, 633, 634 and 637 (the “Common Plant Accounts”) is generally older than the plant booked to accounts 635 and 636 (see Robinson Testimony at 8; Exh. DTE-1-9; Exh. DTE-2-5).

Further, evidence that the Company’s commercial streetlighting equipment is generally older than its municipal streetlighting equipment can be found in Waltham’s own Exhibit W-2, which is the Company’s purchase price calculation for Waltham’s streetlights. In that exhibit, the ratio of gross investment to accumulated depreciation in account 636, after “Step 1”, *before* the allocation of costs and depreciation in the Common Plant Accounts, is approximately 60/40, as compared to the 80/20 ratio in account 635 (Exh. W-2, at 1). The higher percentage of accumulated depreciation in the Company’s commercial streetlighting account (as compared to the municipal account), i.e., approximately 40 percent versus 20 percent, is clear evidence that the equipment in the Company’s commercial account is generally older than the equipment in the municipal account. Accordingly, Waltham had ample notice before April 11 that the Company’s methodology is based on the fact that the commercial streetlighting equipment in Waltham is generally older than the municipal equipment and, thus, accumulated depreciation in the Company’s Common Plant Accounts was allocated proportionally to account 636 for purposes of pricing Waltham’s municipal streetlights

¹ The Letter also contains a statement by Waltham’s counsel regarding the change out of mercury fixtures with sodium fixtures in Waltham, which is wholly unsupported by any evidence in the record (April 19 Letter at 3). This is a further example of the lack of competent foundation for admission of the Documents.

for sale. Therefore, to the extent Waltham wished to submit evidence in the form of Document A to challenge the Company's case, it should have done so back in January, along with its Petition, or at any time up to and including April 11.

Moreover, to the extent that the argument for "good cause" is based on the assumption that Document A refutes the Company's testimony, as explained in the attached Affidavit of Bryant K. Robinson, the information contained in Documents A is totally consistent with the Company's testimony. As noted by Mr. Robinson, there is no information in Document A that is inconsistent with the Company's testimony that the underground plant installed in Waltham serves both the commercial and municipal streetlights, and that such underground plant was installed generally around the same time as the streetlight plant booked to accounts 635 and 636, respectively. Because Waltham fails to state good cause why Document A should be included in the record of this proceeding at this late date, the Department should deny Waltham's request with respect to Document A.

Neither has Waltham stated good cause why Document B should be included in the record of this proceeding. The only identification of the document is provided by counsel for Waltham. Moreover, no expert witness has supported Waltham counsel's claims regarding the Document's "interesting feature" (see April 19 Letter at 3). In addition, and most damaging to any future claim by Waltham that there is good cause for its inclusion in the record at this late date, Waltham states that the document is ten years old (id.). Waltham is attempting to use the document to attack the "equity of allocating virtually all of the negative net value associated with accounts 633 and 634...to the commercial lights" (id.). However, if Document B is so important to Waltham's case,

Waltham should have provided the document to the Department prior to April 19, and supported its assumptions regarding the document through an expert witness. Moreover, Mr. Robinson's affidavit explains that one cannot determine from the document whether the streetlights listed are "serviced pursuant to underground streetlight rates" as alleged by counsel for Waltham (see April 19 Letter at 3), and challenges the relevance of that information, even if true. Accordingly, Waltham has not shown good cause why Document B should be included in the record in this proceeding.

Once again, Waltham's claims are merely vague and unsupported references to unfairness. The Department should not reward Waltham for its lack of attention to the Department's procedural rules by allowing Document B to be included in the record in this proceeding. Indeed, Waltham has failed to state good cause why either Document A or B should be included in the record in this proceeding and the Department should deny Waltham's request.

III. CONCLUSION

Waltham has failed to demonstrate good cause why the Department should grant its request to file post-hearing exhibits in this proceeding. Nor has Waltham justified violating the Department's procedural rules in filing the Documents without leave from the Department. Accordingly, the Company respectfully requests that the Department deny Waltham's request to include the Documents in the record of this proceeding.

WHEREFORE, the Company requests that the Department:

1. Deny Waltham's request as found in its April 19 Letter; and
2. Grant such other relief as the Department deems necessary and appropriate.

Respectfully submitted,

**BOSTON EDISON COMPANY d/b/a
NSTAR ELECTRIC**

By Its Attorneys,

John Cope-Flanagan, Esq.
Assistant General Counsel
NSTAR Electric & Gas Corporation
800 Boylston Street
Boston, MA 02199
(617) 424-2103 (telephone)
(617) 424-2733 (facsimile)

-and-

Robert N. Werlin, Esq.
John K. Habib, Esq.
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110
(617) 951-1400 (telephone)
(617) 951-1354 (facsimile)

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